

CRIMINAL APPEAL NO.810 OF 1987.

Date of decision: 19.2.1996.

For approval and signature

The Honourable Mr. Justice R. R. Jain

and

The Honourable Mr. Justice H. R. Shelat

Mr. B.B. Naik, advocate for appellant.

Mr. K.P. Raval, APP, for respondent-State.

1. Whether Reporters of Local Papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of judgment?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

Coram: R.R.Jain & H.R. Shelat, JJ.

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February 19, 1996.

Oral judgment (Per Jain, J.)

The appellant before us is the original accused in Sessions Case No.14/87 tried by the learned Additional Sessions Judge, Valsad at Navsari. The learned trial Judge was pleased to convict for offence under Section 302 of IPC and sentence to suffer rigorous imprisonment for life vide his judgment and order dated 19.9.1987. Aggrieved by the said order of conviction, the appellant

has preferred this appeal.

Briefly stated the facts giving rise to this case are as under:

On the relevant day, that is, 18.1.1983, deceased Yasudi, witness Murli and two other persons, i.e., Bharat and Sali, went in forest for cattle grazing. As alleged, when deceased Yasudi was getting fresh and washing her hands in river, the accused came and gave fatal blow with sickle at the cervical vertebral region which resulted into death. Murli, a child aged about 7 to 8 years (at the relevant time) alleged to have seen the incident. He immediately rushed towards village to inform about the incident to the near and dear. He went at his residence and informed his mother, who, in turn, came at the place of the incident and saw Yasudi's deadbody. In this background, a complaint came to be lodged by Hiraman Dhavdu, brother of deceased, setting investigation in motion. From the material placed before the Court, the accused was charge-sheeted for the offence under Section 302 read with Section 201 of IPC for causing death of Yasudi and causing disappearance of the evidence.

This is a case wherein a sole eye witness, P.W.5, i.e., Murli Kishan, aged about 12 years (on the date of deposition) has been examined to fortify the case of prosecution. The question is how far the witness is reliable and is telling truth and to what extent reliance can be placed. The child witness, Murli Kishan, has been examined at Ex.15 as P.W.5. From the record it transpires that the witness was not able to speak in Gujarati and that whatever he was speaking was not understood by the court and, therefore, assistance of interpreter was sought. Before examining this witness on oath, preliminary inquiry was made through the interpreter and ultimately the Court came to the conclusion that the witness understands sanctity of oath and, therefore, was examined on oath and deposed as per case of prosecution. The witness was put on the anvil of cross-examination and has been brought on record that examination of Y this witness it is evidently clear that before he came to Court for deposing on oath, he was tutored by complainant as well as police personnel. The manner and method in which he was tutored suggest that he was not tutored to get his memories refreshed but was tutored as to what is to be deposed. The witness was not tutored once or twice but more than that and, therefore, only inference can be drawn is that he was tutored with a view to teach him and not to refresh his memory. For refreshing memories attempt by any one of agencies either

complainant or police is sufficient but attempt is made by both the agencies in such a fashion which would go to show that is done so to secure result. This infers that the evidence does not come in natural course but in a way desired and thus shakes reliability. In such circumstance, his evidence has to be appreciated carefully and with great caution and must get corroboration from other independent witnesses. This witness also refers to the presence off two other independent witnesses i.e., Bharat and Sali. Out of the two, only one i.e., Sali has been examined as P.W.6, at Ex.16. What is the evidential value of the evidence given by her will be discussed by us at appropriate time, but at the outset we say that her testimony has created doubt about the trustworthiness and reliability of the testimony of the child witness. The child witness in terms has stated and confirmed presence of Bharat and Sali but Sali, P.W.6, at Ex.16, categorically denies her presence at the relevant time at the place of incident. Therefore, Sali being another eye witness as per the case of prosecution as deposed by this child witness P.W.5, does not support the prosecution case, and thus a doubt is created about the correctness of the prosecution version by two conflicting versions. The child witness further says that immediately after the incident when he rushed towards the village, he informed his mother only and none else. So the first person to know about the incident was his mother. But, unfortunately, the prosecution has not examined her to bring on record as to how and who informed where and whom. This would have been an additional factor assess correctness and trustworthiness. The child witness was also shown the sickle alleged to have been used by the appellant for commission of offence. He could identify. The only reason assigned for identifying the sickle, which is ordinarily found in the houses of every villagers, is that the sickle blade was found with blood stain. But if we look to the recovery panchnama as well as the evidence of investigating officer, the evidence is otherwise. The sickle was recovered after a period of 3 1/2 years and when recovered was not stained with blood. With such an inconsistent evidence, we find it difficult to accept the testimony of the child witness, especially for identifying the weapon. Though the child witness has alleged presence of Sali, she as P.W.6, at Ex.16, denies her presence at the time and place of incident. When the witness herself denies her presence, allegation about her presence made by other witness should have got been corroborated by other independent witnesses or evidence, but the prosecution has chosen not to do so for the reasons best known to it and, therefore, child witness,

the sole eye witness, cannot be trusted blindly.

Coming to the question of FIR, Ex.26, lodged by Hiraman Dhavdu, we find lot of inconsistencies between the FIR and the oral testimony of this witness, P.W.2, at Ex.8. It would be worthwhile to state that the complainant is not an eye witness. The complaint is based on hearsay evidence and, therefore, would entirely depend upon the testimony of eye witness one who is alleged to have disclosed these facts to this witness. Since the complainant is not a eye witness, his testimony will not be relevant and useful for the purpose of proving the actual incident. The contents of FIR as well as the oral testimony will also reflect upon the reliability and credibility of the so-called eye witness. As discussed above, according to the child eye witness, P.W.5, at Ex.15, immediately on seeing the incident, he rushed towards the village and informed his mother. In fact whether the child witness had informed his mother that could have got been testified through the evidence of Bai Laxmi, but she has not been examined. As regards the source of information, the complainant has stated that at the relevant time he had gone out for shopping and while returning he was informed by his uncle, Kishan Laxman. So his information about commission of offence was also based on hearsay evidence. But in his oral evidence, he says that at the relevant time when the child witness Murli came at their residence and broke the news he himself was present. There upon he also went to the place of occurrence and seen the deadbody of Yasudi. With this evidence, we feel that there is material inconsistency with regard to source of information of the complainant. In his oral testimony, he says that he was informed by the eye witness whereas in complaint he says that he was informed by his uncle Kishan Laxman, who in turn, was informed by his mother. With this contradictory version, we are unable to convince ourselves to accept the complainant as reliable and trustworthy witness in support of prosecution case.

Mr. Naik, learned advocate for the appellant, has also drawn our attention to the evidence of P.W.76, Ex.19. Witness Sali, wife of Kishan, mother of Murli Kishan. She says that Murli had informed her about the incident and thereafter she went to the place of incident. As against that, the complainant, P.W.2, in terms states quite contrary to this, that Murli had informed his mother Bai Laxmi and thus, a doubt is created about the person to whom the information was alleged to have been given by the child witness Murli Kishan. With this evidence on record, now revert to the evidential value of

the evidence coming from other witness. We say that the testimony of child witness does not get corroboration from any other circumstance or independent evidence. The evidence of child witness cannot be relied upon for the simple reason that he was tutored not to get his memories refreshed but tutored to teach him as to what he is to say before the Court. This has to be read between the lines and we can very well infer from the oral testimony of this witness. If this is done, evidence of such a child witness who is a sole eye witness has to be tested with great care and caution. With material inconsistencies on record, we feel that the evidence of child witness is not reliable and trustworthy, much less credible and, therefore, cannot be the sole basis for convicting the accused.

The learned A.P.P. Mr. Raval has also invited our attention to the evidence of P.W.8, Laxman Devji, Ex.20. This witness is brother-in-law (sister's husband) of the accused. This witness is examined with a view to prove extra judicial confession alleged to have been made by the accused. On careful scrutiny of the testimony of this witness, we find that this witness also cannot be relied upon. According to this witness, at the relevant time, he was also in forest and was working at a distance of about 300 ft. approximately. After committing this illthought act, the accused had climbed up a tree and was found shouting making admission of commission of offence. Such admission as alleged was heard by him and thereafter he immediately returned at his home but did not inform to any person including Ramu, the elder brother of the accused who had met him. Not only he did not inform Ramu but he also not informed anybody in his village. Furthermore, there is an admission on his part in his cross-examination that his statement was recorded after four days and that too at the instance of the complainant Hiraman Dhavdu. It has also come on record in cross examination that the statement was recorded at the instance of the complainant and in presence of two more persons. Naturally when a witness states something at the instance of the complainant, it creates a doubt about his independence and creates doubt about fabrication of entire design for implication. It cannot be gainsaid that the complainant is always an interested witness and, therefore, by hook or crook with a view to settle scores with the accused and see that he does not go scot free naturally he will inspire somebody to give statement which may be in a fashion to suit the convenience of the prosecution. Therefore, on this count also this witness cannot be treated as an independent witness. His conduct of not informing anybody also casts shadow of doubt.

Ordinarily, when a person who is closely related to the accused would try to inform his family members so that appropriate steps can be taken. The accused is his brother-in-law (wife's brother) and yet this witness does not inform his wife nor he informs Ramu, his another brother-in-law, the elder brother of accused. This is quite contrary to the natural conduct of a man of common prudence and, therefore, his testimony also cannot be relied upon. Mr. Naik, learned advocate for the appellant, has argued that according to this witness, at the relevant time, he was at a distance of about 300 ft. and, therefore, could not have heard the shouts alleged to have been made by the accused in the nature of confessional statement. This submission also gains grounds when viewed with the evidence discussed with his admission discussed hereinabove, we feel that evidence of this witness is also not trustworthy or reliable and credible as we are unable to accept that part of his testimony which refers to extra judicial confession alleged to have been made by the accused.

If we discard the evidence of the child witness, the sole eye witness, as well as the evidence of P.W.8 (for the purpose of extra judicial confession), we find no evidence on record which can help the Court to convict the accused. In the background of this discussion, we hold that the prosecution case is not supported by any eye witness nor the prosecution has also been able to prove by other circumstantial evidence which can corroborate the so-called eye witness and thus the learned trial Judge has fell in error in placing heavy reliance upon the evidence of sole eye witness, P.W.5, at Ex.15, and convicting the accused as a result of which the finding given by the learned trial Judge deserves to be upset.

In the result, the appeal is allowed. The order of conviction and sentence passed by the learned trial Judge is quashed and set aside. The appellant is acquitted of the offence charged and is ordered to set at liberty forthwith if not required in connection with any other case. Muddamal article should be disposed of in accordance with the order of the trial Court.